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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 779

SPANOS PAINTING CONTRACTORS, INC., *Petitioner,*

v.

UNION BUILDING AND CONSTRUCTION CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. ------

SPANOS PAINTING CONTRACTORS, INC., *Petitioner*,

v.

UNION BUILDING AND CONSTRUCTION CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 20, 1964.

CITATIONS TO OPINIONS BELOW

The Opinion of the District Court is unreported and is printed in the record (A. 76a-83a).* The Opinion of the Circuit Court of Appeals, printed in the Appendix hereto (*infra*, p. 9), is reported at 334 F. 2d 457.

* References to "A" are to pages in the printed Appendix to Petitioner's Brief in the Court of Appeals, which Appendix is a part of the certified record in these proceedings.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1964 (*infra*, p. 9). A timely petition for rehearing was denied on September 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioner has been deprived of its property without due process of law in that the record is completely barren of any evidence in support of the lower court's decision?

2. Whether the decision of the court below is in direct conflict with the applicable New York law as to the burden of proof of the authority of an agent and the evidentiary facts required to sustain a legal conclusion of implied or apparent authority?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional Provision involved is the Fifth Amendment of the Constitution of the United States, the pertinent part of which provides: "No person shall be . . . deprived of life, liberty or property, without due process of law. . . ."

STATEMENT

Petitioner, Spanos Painting Contractors, Inc., brought an action in the District Court against the Respondent, Union Building and Construction Corporation, to enforce a lien for monies due for materials and labor provided (A. 6a). The jurisdiction of the United States District Court was invoked under 28 U.S.C., Sec. 1332 and was based upon the diversity of citizenship of the parties. The amount in controversy exceeds Ten Thousand Dollars exclusive of interest.

Under the pre-trial Order of May 4, 1962 (A. 17a) Spanos' entire affirmative case was stipulated and agreed to. The only issue which remained to be tried was Union's affirmative defense, i.e., the validity of a document dated March 31, 1960, signed by Nicholas Tsoucalas and purporting to be a general release from Spanos to Union (Exhibit G, A. 71a).

The basic facts were not in dispute. Union was the general contractor under a contract with the State of New York and the New York Thruway for certain highway improvements (A. 18a). In connection therewith, Union, with its surety, gave a labor and material bond under Sec. 137 of the New York Finance Law guaranteeing payment to all persons supplying material for or performing labor on the work (A. 54a, 55a). Union subcontracted a portion of the work to Cunningham, Neilson and Malloy, Inc., who in turn, in May, 1959, subcontracted certain painting work to Spanos (A. 18a).

In November, 1959, Spanos having completed its work and not having been paid, retained Nicholas Tsoucalas, a New York attorney at law, to collect the monies due it. Tsoucalas filed a mechanic's lien, brought suit against Cunningham, obtained judgment in favor of Spanos, and attempted to execute thereon (A. 33a, 34a). These were the only acts done by Tsoucalas prior to March 31, 1960.

On March 31, 1960, Tsoucalas, without receiving payment of Spanos' claim, executed a general release and release of lien in the name of Spanos and in favor of Union (A. 42a, 43a, Exhibit G, 71a, Exhibit I, 74a). On the basis thereof, Union paid to Cunningham all the monies owed by it, which monies Cunningham in turn paid to another of its creditors.

Union admitted in the pre-trial Order that it had no knowledge of any instrument in writing giving Tsoucalas

authority to sign releases on behalf of Spanos (A. 21a-1, 21a-2). Tsoucalas, when called to testify by Union, while admitting that the signatures on the documents were his, denied that he had intended to sign such documents or that he had any authority from Spanos to do so (A. 49a, 41a, 42a, 44a, 45a, 47a, 48a, 50a, 51a, 53a, 55a). The only other evidence before the Court consisted of Exhibits C, D, E, F and H (A. 60a-73a). Of these documents only Exhibit C was in existence on March 31, 1960, the date of the general release. None of these Exhibits in any way concern the authority of Tsoucalas to sign a general release on March 31, 1960. There is no evidence whatsoever that Union knew of or in any way relied on any of these Exhibits on March 31, 1960.

The District Court, without any reference to the evidence upon which it was based, made a finding of fact that Tsoucalas had authority to sign the releases (A. 79a). On appeal, the Court of Appeals affirmed. In its opinion the Court held that the District Court was not required to believe Tsoucalas' uncontradicted testimony that he did not have authority to execute the releases in question and accordingly was justified in concluding that Tsoucalas had the requisite authority (*infra*, p. 12). A petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with decisions of this Court on an important issue affecting federal constitutional rights.

The decision below affirms a finding that Tsoucalas had authority to execute a release on behalf of Spanos although the record is completely devoid of any evidence to support such a holding either as a finding of fact or a conclusion of

law. Accordingly, the decision below deprives Spanos of its rights under the Fifth Amendment of the Constitution and conflicts with the principles of due process as set forth in this Court's decisions in *Thompson v. City of Louisville*, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624; *Garner v. Louisiana*, 368 U.S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248; and *Taylor v. Louisiana*, 370 U.S. 154, 8 L. Ed. 2d 395, 82 S. Ct. 1188, reh. den., 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578.

To support a holding that Tsoucalas had authority to execute a release on behalf of Spanos, there must be some evidence from which it can at least be reasonably inferred that he had actual, implied or apparent authority. The record is completely barren of any such evidence. The only evidence as to actual authority, is Tsoucalas' uncontradicted testimony that Spanos *did not* authorize him to sign the releases in question. If the District Court chose not to believe his testimony, such disbelief does not convert Tsoucalas' testimony into evidence of actual authority.

It is the established law of New York, as well as generally, that an agent (including an attorney-at-law) employed to collect a debt has no implied authority to give a release except upon payment in full. *Louis v. Duane* (1894), 36 N.E. 322, 325, 141 N.Y. 302, 313; *Mazella v. American Home Construction Co., Inc.* (1961), 211 N.Y.S. 2d 131, 12 App. Div. 2d 910. The record clearly shows that Tsoucalas received no such payment.

Finally, it is the clear and unequivocal law of New York that apparent authority is created only by acts or omissions of the principal known to and relied upon by those dealing with the agent in the exercise of reasonable prudence. *Wen Kroy Realty v. Public Nat. Bank & Trust Co.* (1932), 183 N.E. 73, 260 N.Y. 84; *O. A. Skutt, Inc. v. J. & H. Goodwin, Ltd.* (1937), 295 N.Y.S. 772, 251 App. Div. 84.

The record is totally devoid of any evidentiary support to sustain a legal conclusion that Tsoucalas had apparent authority to execute releases on March 31, 1960. Prior to that date Tsoucalas performed only four acts on behalf of Spanos — (1) filed a mechanic's lien, (2) filed suit against Cunningham, (3) obtained judgment against Cunningham, and (4) attempted to execute on the judgment. All other acts referred to by the Court (assignment of accounts receivable and agreement to forbear from taking further legal action, *infra*, p. 12) occurred either on March 31, 1960 (Exhibit C, A. 50a) or as much as 4 months later (Exhibits D, E and F, A. 62a-70a). There is no evidence whatsoever as to any acts or omissions of Spanos, known to Union and upon which it relied, and which lead it to believe on *March 31, 1960* that Tsoucalas had authority to execute releases.

The record being totally lacking of any evidentiary support whatsoever for the findings and conclusions of the Court, its decision is arbitrary and capricious and therefore unconstitutional under the due process provision of the Fifth Amendment.

II.

The decision below conflicts squarely with the applicable law of New York as to the burden of proof of an agent's authority and the evidence required to support a legal conclusion of implied authority and apparent authority.

A. It is the long established and unquestioned law of New York (as well as elsewhere) that the one who seeks to charge a principal with the acts of an agent has the burden of proving the authority of the agent. *Booth v. Litchfield* (1911), 94 N.E. 1078, 1079, 201 N.Y. 466. Nevertheless, it is evident from the decision of the Court below that the evidence in the case was viewed by it as though

there were a presumption of authority which Spanos failed to rebut. This is evident from the great stress laid by the Court on the fact that the president of Spanos did not testify to substantiate the uncontradicted testimony of Tsoucalas that he had no authority to execute the releases in question (*infra*, p. 12).

B. The evidentiary facts required under the law of New York to support a legal conclusion of either implied authority or apparent authority of an agent to do a particular act are set forth above (*supra*, p. 5). The case of *Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co.* (1932), 183 N.E. 73, 260 N.Y. 84, cited above as stating the applicable New York law concerning apparent authority, was cited with approval by the Court of Appeals for the Second Circuit as recently as March 2, 1964. *Masuda v. Kawasaki Dockyard Company* (1964), C.C.A. 2d 328 F. 2d 662, 665. Nevertheless, it is evident from the record and the opinion of the Court below that in this case the applicable New York law has been totally ignored. There is no evidence to support any finding that prior to or on March 31, 1960, the day upon which the releases were signed, Union had any knowledge of or relied upon any act or omission of Spanos which could reasonably lead it to believe that Tsoucalas had authority to sign a general release or release of lien.

III.

Importance

A. The question concerning the deprivation of the Petitioner's constitutional rights presented by this case is of great significance in the administration of justice. The importance of this issue with respect to personal rights of liberty in criminal cases has already been recognized by this Court. *Thompson v. City of Louisville*, 362 U.S. 199,

4 L. Ed. 2d 654, 80 S. Ct. 624. While this case involves property rights and is a civil proceeding, the same constitutional principles are applicable and controlling. The arbitrary decision of a court based upon a record completely devoid of evidentiary support is a denial of due process whether it concerns rights of liberty in a criminal proceeding or rights of property in a civil case.

B. The decision of the Court below is squarely in conflict with the applicable New York law of agency. To allow it to stand, cannot help but create confusion as to the rights and obligations of agents, principals and those with whom they deal. New York, the center of the commercial world, should certainly be free of such a handicap.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 425—September Term, 1963.

(Argued May 27, 1964 Decided July 20, 1964.)

Docket No. 28705

SPANOS PAINTING CONTRACTORS, INC.,
Plaintiff-Appellant,

v.

UNION BUILDING & CONSTRUCTION CORP.,
Defendant-Appellee,

and

CUNNINGHAM, NIELSEN & MOLLOY, INC., FIDELITY & DEPOSIT COMPANY OF MARYLAND, THE PEOPLE OF THE STATE OF NEW YORK, NEW YORK STATE THRUWAY AUTHORITY, DEPARTMENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, REINFORCED STEEL CONTRACTING CORP., CHISHOLM CONTRACTING COMPANY, SYRO STEEL COMPANY, ERNST STEEL CORPORATION, GULF OIL CORPORATION,
Defendants.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *J.*, sitting without a jury, dismissing the

plaintiff's complaint in an action to foreclose a mechanic's lien.

Affirmed.

EVAN A. CHRISS, Baltimore, Maryland (Harry Giesow, Gainsburg, Gottlieb, Levitan & Cole, New York, N.Y., on the brief), *for plaintiff-appellant.*

WILLIAM J. MURPHY, Albany, New York (McClung, Peters & Simon, Albany, New York, on the brief), *for defendant-appellee.*

LUMBARD, *Chief Judge:*

This appeal, brought in a diversity action by Spanos Painting Contractors, Inc., from a judgment of the United States District Court for the Southern District of New York which dismissed its complaint after a trial without a jury, raises four claims: (1) that there was insufficient evidence to support Judge Bonsal's finding of fact that Spanos' attorney had authority to execute two releases to the appellee, Union Building & Construction Corp.; (2) that the releases contravened the public policy underlying §137 of the New York State Finance Law and therefore they are null and void; (3) that the district judge erred in refusing to grant rescission of the releases on grounds of mistake and lack of consideration; and (4) that the district judge erred in permitting modification of the pre-trial order. Finding these claims to be without substance, we affirm the judgment of the district court.

The basic facts are undisputed. Union, a New York corporation, entered into a contract in 1957 with the New York State Public Works Department to improve the Berkshire Spur of the New York Thruway. Union subcontracted highway guardrail work to Cunningham, Nielsen & Molloy, Inc., which in turn in May 1959 subcontracted the painting of this rail to Spanos, a Maryland corporation. Under its

contract with the State, Union, with its surety, filed a labor and material bond under §137 of the New York State Finance Law.

Following Cunningham's failure to pay Spanos, Spanos retained Nicholas Tsoucalas, a New York attorney, to represent it in negotiating a settlement of its claim. In November 1959 he filed a mechanic's lien with the state comptroller against the monies due Cunningham under the Berkshire Spur contract and shortly thereafter instituted suit in the Southern District against Cunningham which resulted in a judgment in favor of Spanos in January 1960. Meanwhile, Syro Steel Co., another supplier to Cunningham under the same contract with Union, also filed a mechanic's lien and brought suit.

On March 31, 1960, Syro and another of Cunningham's creditors, Browne & Bryan Lumber Co., represented by their counsel, met with representatives of Union and Cunningham and agreed that in return for general releases from all of Cunningham's creditors, including Spanos, Union would pay out $50,000, the remainder of its debt to Cunningham under the contract. As part of this arrangement, the parties further agreed that Syro would receive the $50,000 and that Spanos and Browne & Bryan would share certain of Cunningham's accounts receivable and a portion of the proceeds of a proposed sale of its equipment.

Tsoucalas was not present at these negotiations but was consulted by telephone and agreed to this disposition. After conferring with the president of Spanos, he executed a general release of Union and its surety and a release of Spanos' rights under its mechanic's lien. Negotiations during July resulted in a second agreement between Cunningham and its creditors involving further assignments of its accounts receivable. When Spanos failed to receive the monies due it under these agreements, Tsoucalas, on December 5, 1960, filed, on Spanos' behalf, a second mechanic's lien with the state comptroller which in this action Spanos seeks to foreclose.

Tsoucalas testified that he had been authorized and intended to execute to Union solely a release of $50,000, inas-

much as he had been advised that Union owed Cunningham further sums under the contract and that these sums would be available to satisfy Cunningham's obligations to Spanos. The president of Spanos — the sole individual who might have substantiated Tsoucalas' story — was present in the courtroom during the trial but failed to testify on Spanos' behalf. Despite Tsoucalas' denials, we find ample evidence to support Judge Bonsal's finding of fact that Tsoucalas was authorized to execute a general release as well as a release of the mechanic's lien.

Both releases were short and clear on their face and followed the common printed form for such documents readily available from legal stationers. The general release bore the words "General Release" at its head. Moreover, Tsoucalas conceded that Union's surety had sent him photostatic copies of the releases, although until August 1960 he took no action to rectify the error which he claims had been committed.

Furthermore, the record clearly establishes that Tsoucalas exercised virtually complete authority in the task of collecting Cunningham's debt to Spanos. In need of prompt payment to stave off its own possible bankruptcy, Spanos fully acquiesced in Tsoucalas' activities. In pursuit of his task Tsoucalas had commenced an action and secured a judgment against Cunningham, had filed the proper mechanic's liens, had arranged for the assignment of Cunningham's accounts receivable, and had agreed on behalf of Spanos to forbear from taking any legal action which might throw Cunningham into bankruptcy. Tsoucalas assumed so much responsibility in these matters that the parties naturally turned to him in negotiating the settlement of their accounts.

In view of Tsoucalas' exercise of such broad responsibility, the failure of Spanos' president to substantiate Tsoucalas' testimony, and the reasonableness of executing the two releases so as to facilitate the distribution of funds to all of Cunningham's creditors, Judge Bonsal was not obliged to credit Tsoucalas' testimony that he was authorized to execute only a limited release. Judge Bonsal was

fully justified in concluding that Tsoucalas was authorized to execute both a general release and a release of Spanos' mechanic's lien.

Spanos further contends that the releases contravened the public policy underlying §137 of the New York Finance Law and that they consequently are null and void. We find no merit in this position. Section 137 nowhere states that a waiver of the rights conferred by it is to be deemed null and void.[1] Nor is there any basis in law or reason to presume that the New York legislature did not want to permit contractors to effect whatever arrangements would best suit the particular circumstances of any given situation. *Carroll McCreary Co., Inc. v. People*, 267 N.Y. 37, 195 N.E. 675 (1935). Furthermore, a lienholder's rights under §137 are not analogous, as Spanos suggests, to the rights of a laborer under the Fair Labor Standards Act. To permit a laborer to waive his rights under the act would undermine the very purpose of fair labor legislation. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). The primary purpose of §137, on the other hand, is to provide subcontractors a remedy by which they may recover sums due them where they would have failed under the old, more stringent lien law. *State Bank of Albany v. Dan-Bar Contracting Co., Inc.*, 23 Misc. 2d 487, 491, 199 N.Y.S. 2d 309, 313 (1960), aff'd, 12 A.D. 2d 416, 212 N.Y.S. 2d 386, appeal denied, 14 A.D. 2d 458, 218 N.Y.S. 2d 587 (3d Dep't 1961), aff'd, 12 N.Y. 2d 804, 235 N.Y.S. 2d 835 (1962). Having asserted its rights by obtaining a mechanic's lien, and then having released them, Spanos has had the full protection of the law.

Spanos next maintains that the district judge erred in refusing to grant its prayer for rescission of the releases.

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[1] Section 137 in its relevant part reads that:

"... if, in an action to enforce a mechanic's lien pursuant to the provisions of the lien law, the courts shall find that the laborer or materialman has a valid lien but that such lien cannot be satisfied because the monies, if any, due ... to the subcontractor are insufficient therefor, the laborer or materialman may nevertheless, if he is a beneficiary of a bond required by the comptroller, bring an action to recover the amount of such lien from the obligors of the bond."

Under New York law Spanos is entitled to rescission only if it can establish, first, that Tsoucalas mistakenly executed the releases and, second, that the releases were given gratuitously without consideration. *Buffalo Electric Co., Inc. v. New York*, 9 A.D. 2d 372, 194 N.Y.S. 2d 72 (4 Dep't 1959); *Wheeler v. New York*, 286 A.D. 310, 143 N.Y.S. 2d 83 (3d Dep't 1955).

Assuming *arguendo* that Tsoucalas had mistakenly executed the releases, we find, nonetheless, that Spanos received ample consideration for them. Accordingly rescission must be denied. As part of the settlement arrangements, Union released some $50,000 to Cunningham. This payment, however, was not merely in satisfaction of a pre-existing obligation, since the amount due from Union to Cunningham was in dispute because of certain back charges claimed by Union. By settling this dispute and releasing the monies it owed Cunningham, Union made available a specific fund out of which Spanos and the other creditors could receive their respective shares. This constituted sufficient consideration for Spanos' releases. *Carroll McCreary Co., Inc. v. People, supra.*

Finally Spanos contends that the district judge erred in permitting modification of the pre-trial order. Union had inadvertently conceded in the pre-trial proceedings that it still owed Cunningham a sum of money. Inasmuch as this was not in fact the case, as clearly appears from the record, Judge Bonsal properly accorded Union the opportunity to prove the contrary, in order "to prevent manifest injustice," as provided for in Rule 16 of the Federal Rules of Civil Procedure.

The judgment of the district court is affirmed.